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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MARK KOWACK,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,
an Agency of the United States
Department of Agriculture, and
THOMAS L. TIDWELL, Chief of the
United States Forest Service,

Defendant.

Cause No: 11-

PLAINTIFF'S COMPLAINT

COMES NOW Plaintiff by and through its counsel of record, ANTONIOLI
AND WADE, P.C., and states and alleges as follows:

PARTIES

1. Plaintiff is a Montana resident residing in Hamilton, Montana who is and has been employed for the last thirty-six years at the Trapper Creek Job Corps Center, U.S. Forest Service Center in Darby, Montana.
2. Defendant Thomas A. Tidwell is the Chief of the United States Forest

Service, an agency of the United States Department of Agriculture.

3. Defendant United States Forest Service is an agency of the United States Department of Agriculture.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the Plaintiff's claim pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a) (4) (B). This action is filed to order the production of agency records which are being withheld concerning the "Report of Investigation re: Mark Kowack vs. Trapper Creek Job Corps Center" which resulted from Plaintiff Mark Kowack's harassment claim against the Trapper Creek Job Corps Center.
5. Plaintiff Mark Kowack is a dedicated, loyal and excellent long-term federal employee. In December of 2008, Plaintiff Kowack filed a claim of hostile work environment with the Trapper Creek Job Corps Center. This hostile environment included physical threats, harassment, verbal abuse, as well as attempts to intimidate and provoke. Plaintiff Kowack was advised that an investigation concerning his hostile work environment complaint was made.
6. On July 19, 2010 Plaintiff Kowack made a Freedom of Information Act [FOIA] request for a copy of the Report of Investigation. The FOIA request specifically asked for a "complete copy of the Report of Investigation re:

Mark Kowack vs. Trapper Creek Job Corps Center in Darby, Montana” as well as copies of “any and all statements, interviews, photos, notes and any other documents that pertain to the ‘misconduct investigation’” concerning Plaintiff’s harassment claim against the Trapper Creek Job Corps Center.

7. On October 4, 2010 Plaintiff Kowack received a response to his FOIA request. The response states:

A search of paper and electronic files maintained by ASC-HRM and the offices of the Trapper Creek Job Corps Center was conducted, with 173 pages found responsive to your request. Ninety-three (93) pages are being released in full or part. The pages that are being withheld or have been redacted, have been withheld or redacted to protect privacy information in accordance with 5 U.S.C. 552(b)(6) of the FOIA.

Subsection 6 of 5 U.S.C. 552(b) states that the general FOIA disclosures do “not apply to matters that are---(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”.

8. Plaintiff Kowack did not request any personnel or medical files. A Report of Investigation of a claim of government workplace violence and harassment is not a file which can be construed to be “similar” to a personnel or medical file and there is no “personal privacy” involved in an investigation of workplace violence or harassment occurring during work hours in a government facility in which members of the public are present.
9. Plaintiff Kowack perfected a FOIA appeal on November 9, 2010. Plaintiff’s

FOIA appeal was stonewalled by Defendant. Plaintiff's counsel was required to send numerous letters and phone calls over a period of six months.

10. Finally, on May 10, 2011 Plaintiff's counsel sent a letter to Defendant with a courtesy copy of a draft complaint advising Defendant that unless the requested documents were produced no later than May 19, 2011, the Complaint for Injunctive Relief would be filed.

11. By letter dated May 19, 2011, received on May 23, 2011, Defendants provided a response to the November 9, 2011 FOIA appeal.

12. The response is wholly inadequate. Defendants original response dated October 4, 2010 stated; that there were **"173 pages found responsive to your request.** Ninety-three (93) pages are being released in full or part."

The May 19, 2011 response states: "We have completed a de novo review of **188 pages responsive to your original FOIA request.**" There is no explanation of the discrepancy between the October 4, 2010 report that there were 173 pages and the May 19, 2011 report stating there are 188 pages. Moreover, of the 188 pages produced, 48 pages were so significantly redacted that it is impossible to glean information from the pages. [See attached Exhibit A.]

13. In the May 19, 2011 response, in stark contrast to the October 4, 2010 response Defendants **now claim** that FOIA exemptions 5 U.S.C. 552(b)5, 6 and 7(c) apply [two additional exceptions beyond what Defendant claimed in October of 2010]: (5) inter-agency or intra-agency memorandums or letters; (6) personnel and medical files and similar files; (7(c)) “records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.”
14. Plaintiff has been denied access to the requested information. Plaintiff has a right to the requested information under 5 U.S.C. §552(a)(3), and there is no legal basis for defendant’s denial of such access. Because of the significant number of redactions, it is impossible to determine exactly what has been omitted. However, it does appear that with the exception of the information provided by Plaintiff himself, information gathered as a part of Plaintiff’s hostile work environment complaint from other co-workers at the Trapper Creek Job Corps Center has been redacted.
15. Based on the information provided, it does not appear that the redacted information is (5) “inter-agency or intra-agency memorandums or letters”; nor (6) “personnel and medical files and similar files”; nor (7(c)) “records or

information compiled for law enforcement purposes, but only to the extent that the production of such records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

16. It is clear that none of the persons interviewed had any expectation that the information or comments they were providing would be confidential. For example, the December 4, 2009 letter from the USDA Misconduct Investigations Program Manager to Margo Bramell, Employee Relations Specialist authorizing Ms. Bramell states in pertinent part:

You are fully authorized to conduct research and investigate all aspects of the investigation and require employees of the Forest Service to cooperate in the conduct of the investigation and to require full cooperation from employees possessing knowledge or affirmation **without a pledge of confidentiality.**

. . . .USDA employees are obligated to give information to authorized representatives of the Department when called upon **if the inquiry relates to official matters and the information is obtained in the course of employment as a result of relationships incident to USDA employment.** . . .[Exhibit B.]

17. In addition, even with the redactions, the sworn statements of the federal employees who were interviewed make it abundantly clear that any information they provided would not be held in confidence:

[BLACKED OUT] being duly sworn under oath, make the following statement to Margo M. Bramell, who has identified herself to me as a Personnel Misconduct Investigator, United States Department of Agriculture, National Office, Golden, CO, **knowing this statement may**

be used in evidence. This statement is being furnished to comply with USDA regulations which require me to cooperate in this matter.

I understand that this statement is not confidential and may be shown to any party with an official interest. [Exhibit C.]

WHEREFORE, Plaintiff Kowack requests this Court:

1. Order Defendant to provide complete and unredacted copies of the requested FOIA documents;
2. Expedite this proceeding as provided for in 28 U.S.C. § 1657;
3. Award Plaintiff his costs and reasonable attorneys fees in this action, as provided for in 5 U.S.C. § 552(a)(4)(E);
4. Order Defendant to refrain from such misconduct in the future; and
5. Grant such other and further relief as may be deemed just and proper.

Respectfully submitted this 27th day of June, 2011.

ANTONIOLI AND WADE, P.C.

/s/ Stacey Weldele-Wade
Stacey Weldele-Wade

Certificate of Service

I certify that on the 27th day of June, 2011, a true copy of the foregoing document was served on the following persons by the following means:

<u>1,2</u>	CM/ECF
_____	Hand Delivery
_____	Mail
_____	Overnight Delivery Service
_____	Fax
_____	E-Mail

1. Clerk, U.S. District Court

/s/ Stacey Weldele-Wade
Stacey Weldele-Wade
Antonioli and Wade, P.C.
Attorneys for Plaintiff

